

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STARK V. WEATHERHOLT

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MIKAYLA STARK, APPELLANT,
V.
CURTIS WEATHERHOLT, APPELLEE.

Filed February 28, 2012. No. A-11-446.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge.
Affirmed.

Charles M. Bressman, Jr., of Anderson & Bressman Law Firm, P.C., L.L.O., for
appellant.

Christopher Perrone, of Perrone Law, and Ryan D. Caldwell, of Caldwell Law, L.L.C.,
for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Mikayla Stark appeals an order of the district court for Douglas County, Nebraska, denying her request to relocate with the parties' child from Nebraska to Washington to live with her new husband. While we disagree with the district court's finding that Stark did not have a legitimate reason to request removal, we agree that Stark failed to sufficiently demonstrate that removal would be in the child's best interests. Finding no abuse of discretion in the district court's decision to deny the request to remove the child from Nebraska to Washington, we affirm.

II. BACKGROUND

Stark and Curtis Weatherholt are the parents of Gaige Weatherholt, born in 2008. Stark and Weatherholt were never married, but they did live together from February 2008 to January 2010. Stark has been the primary caregiver of Gaige since his birth.

In March 2010, Stark filed a complaint to establish paternity and support and requested that she receive sole temporary and permanent custody of Gaige. Weatherholt did not contest the paternity. Pursuant to the parties' agreement, the district court entered a temporary order in June 2010, awarding Stark custody of Gaige subject to Weatherholt's parenting time which was specifically set forth in the order and included every Tuesday evening and alternating weekends. They also agreed that Weatherholt would have the right of "first refusal" to additional parenting time when Weatherholt is not working and when Gaige is in daycare. The temporary order also required that Weatherholt pay \$660 per month in temporary child support, pay 70 percent of daycare expenses, and provide health insurance for Gaige through his employment.

Stark began dating Matthew Mahler in June 2010 and became engaged to him in November 2010. At that time, Mahler was stationed in South Korea with the U.S. Army. On November 30, Weatherholt filed a motion for ex parte order to prohibit either party from permanently removing Gaige from the State of Nebraska. The motion alleged that Stark threatened to move with Gaige to South Korea. Stark and Weatherholt reached an agreement that neither party would be allowed to permanently remove Gaige from the State of Nebraska until further order of the court, and an order was entered to that effect. Stark married Mahler in South Korea on December 29.

Trial was held on April 14, 2011, on Stark's complaint for permanent custody and Weatherholt's request for joint legal custody. At the commencement of the trial, Stark requested permission from the court to amend her complaint to seek removal of Gaige from Nebraska to Washington. Weatherholt objected to the late notice, although he admitted that he was aware of the issue, because in December 2010 he was informed that Stark planned to move with Gaige to South Korea. Because the issue itself was not a surprise and the parties were prepared to address it that day, the district court allowed the filing of the amended complaint, although such does not appear in our appellate record.

At the time of trial, Stark was pursuing a degree in biology at the University of Nebraska at Omaha and was not otherwise employed. Stark was utilizing student loans to pay for her education. Prior to enrolling in college, Stark was a stay-at-home mother with Gaige. Gaige goes to daycare 3 to 5 days per week while Stark attends classes or studies. No evidence was offered concerning Stark's housing arrangement or living expenses in Omaha, Nebraska.

Weatherholt works full time for a construction company. He receives a base pay of \$20.20 per hour and has opportunities to work overtime or on jobs with a higher pay scale. Weatherholt earned approximately \$42,000 in 2009 and \$48,000 in 2010. He estimated that in 2011, he would earn approximately \$42,000 to \$44,000. Weatherholt provides insurance for Gaige through his employment. At the time of trial, Weatherholt lived in a rental house with two roommates.

Stark presented testimony about her relationship and marriage to Mahler, as well as her reasons for wanting to move Gaige to Washington in order to reside with Mahler. Weatherholt

presented testimony about his relationship with Gaige and the reasons why he opposed a move to Washington. In addition, Weatherholt's mother testified to the relationship between Stark and Weatherholt and statements made by Stark to Weatherholt's mother. Further discussion of the testimony will be set forth in the analysis section below.

On May 23, 2011, the district court filed a decree of paternity. The district court awarded Stark sole physical and legal custody of Gaige subject to Weatherholt's parenting time as detailed in the parenting plan. In support of its conclusion that joint legal custody would not be appropriate in this case, the court noted the difficult relationship between the parties since their separation, including their ongoing disagreements and arguments, for which each party "shares the blame." The decree also ordered Weatherholt to pay child support of \$661.41 per month, to maintain health insurance for Gaige, to pay 70 percent of unreimbursed medical expenses after the first \$480 per year, and to pay 70 percent of daycare expenses, and it ordered that each party pay their own attorney fees.

The district court denied Stark's request to permanently remove Gaige from Nebraska. The court found that Stark had not demonstrated a legitimate reason for leaving the state and that even if she had shown a legitimate reason, removal to Washington would not be in Gaige's best interests.

III. ASSIGNMENTS OF ERROR

Stark appeals the district court's denial of her request to remove Gaige to Washington. Specifically, Stark alleges the district court erred in failing to find that she demonstrated a legitimate reason for removal and in finding that removal was not in Gaige's best interests. She also appeals the district court's failure to award her attorney fees.

IV. STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected opinion results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result. *Id.*

In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Absent such an abuse, the award will be affirmed. *Id.*

V. ANALYSIS

1. REMOVAL FROM JURISDICTION

We first set forth the applicable principles of law which originated in the Nebraska Supreme Court's decision of *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best

interests to continue living with him or her. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

(a) Legitimate Reason to Leave State

Stark assigns as error the district court's finding that she did not present a legitimate reason for leaving the state. Stark argues that her marriage to Mahler was a legitimate reason. The record shows that approximately 6 months elapsed between the time Stark and Mahler began dating until their marriage, most of which consisted of a long-distance relationship. At Mahler's suggestion, there was an effort by Stark to reconcile with Weatherholt during this time, which effort was unsuccessful. Further, there was testimony to suggest that Stark married Mahler in order to be able to move Gaige away from Weatherholt. On the other hand, Stark testified that she and Mahler had been friends for nearly 4½ years and knew each other prior to her relationship with Weatherholt. There was evidence to support the conclusion that Stark's marriage to Mahler and a move to live with him in Washington was motivated by Stark's desire to provide her and Gaige with a stable family environment.

Our removal jurisprudence recognizes that remarriage is commonly found to be a legitimate reason for a move. See *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008). The Nebraska Supreme Court has previously held that a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal. *Vogel, supra*.

In finding that Stark had not demonstrated a legitimate reason for leaving the state, the district court stated:

While under normal circumstances a spouse might reasonably be allowed to relocate to another jurisdiction with her minor child or children in the event of her spouse's increased employment opportunities, it is not the same when a spouse marries in order to remove her minor child from the jurisdiction, which is the situation in this case.

We recognize that remarriage does not automatically equate to a legitimate reason for relocation; however, on our de novo review of the record, we find that the district court abused its discretion in finding that Stark's marriage did not constitute a legitimate reason for the move. As such, we find that Stark has met the threshold requirement of the removal analysis.

(b) Child's Best Interests

Having found that Stark met the threshold requirement of demonstrating a legitimate reason for the relocation, we turn to the next step, which is to determine whether Stark demonstrated that it is in Gaige's best interests to live with her in Washington. In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

(i) Each Parent's Motives

The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

The evidence in this case demonstrates that Stark sought removal because she had married Mahler who was being assigned by the U.S. Army to Fort Lewis, Washington, which assignment was to last a minimum of 2 years. Stark wanted to move with Gaige to Washington in order to be with Mahler and so Gaige could "be raised in a family environment, have stability, [and] enjoy all of the opportunities that are up there for him and the family." There was some evidence adduced that Stark also wanted to distance Weatherholt from Gaige. Weatherholt opposed the move because of his desire to maintain frequent contact with his son and his concern about the stability of Stark's marriage. The district court did not make a specific finding with respect to the motive factor other than as set forth above regarding the legitimate reason for removal. We conclude on our de novo review that, at most, the motives of the parties are balanced. As such, this factor weighs neither in favor of nor against the move.

(ii) Quality of Life

In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *McLaughlin, supra*. This list of factors should not be misconstrued as setting out a hierarchy, and depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

a. Child's Emotional, Physical,
and Developmental Needs

The district court made no specific findings as to the potential the move to Washington had to impact the emotional, physical, and developmental needs of Gaige, nor was there any expert testimony on the topic. The record shows that both parties are loving parents and genuinely concerned with, and capable of providing for, their child's needs. There is no evidence that the emotional, physical, and developmental needs of Gaige cannot be met in either Nebraska or Washington. As such, this factor weighs neither in favor of nor against the proposed move.

b. Child's Preference

The child's preference is not a factor in the instant case as he did not testify at trial because of his young age. This consideration does not weigh in favor of or against the proposed move.

c. Enhancement of Income or Employment

Next, we consider the extent to which Stark's income or employment will be enhanced by the proposed move. In the present case, Stark does not work outside the home and did not indicate that she would seek employment in Washington. Stark intends to continue her education in Washington; however, there was no evidence presented that Stark's income and/or employment opportunities would be enhanced by attending one of the colleges in Washington rather than continuing her education in Nebraska.

A custodial parent's income can be enhanced because of a new spouse's career opportunities, for purposes of determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). There was no evidence presented concerning Mahler's income, whether his assignment in Washington provided increased career opportunities or a higher salary, or whether there were any assignment possibilities for him in Nebraska. The record shows that Stark is presently utilizing student loans to pay for her tuition and that since her marriage, Mahler has been contributing to Stark's expenses. However, there is evidence to support the conclusion that Stark's financial situation will be enhanced due to the fact that the family would be living under one roof rather than paying for two households, as well as having access to lower priced goods and services on the military base.

The district court concluded that Stark's quality of life would be enhanced by the move to the extent that her financial needs would be met in a way that she could not do by herself. On our de novo review, we find that this factor weighs in favor of allowing the removal to Washington.

d. Improvement of Housing or Living Conditions

At the time of trial, Stark and Mahler had not yet arranged for housing in Washington as Mahler was not scheduled to report until June 6, 2011. Stark testified that they would be able to live on base at Fort Lewis, or they could live off base, and that the military provides services to assist with selecting housing. No evidence was adduced as to the type or cost of housing available in Washington. There was also no testimony regarding Stark and Gaige's living situation in Omaha; therefore, there was no evidence with which to compare the housing and living conditions between Nebraska and Washington. As mentioned above, the most that can be said regarding this factor is that moving to Washington would allow Stark and her husband to maintain one household instead of two.

The district court did not make a specific finding on this factor. On our de novo review, we find that Stark did not adduce sufficient evidence to show that an improvement of housing or living conditions would exist in Washington over Nebraska. This factor does not weigh in favor of or against relocation.

e. Existence of Educational Advantages

Gaige is not yet school age. He presently attends daycare in Nebraska while Stark is in school. Stark did not testify about daycare facilities in Washington or what advantages in daycare exist over his current arrangements. Stark testified that there are multiple elementary schools on the military base for Gaige to attend in the future and even more in the surrounding

area. No evidence was presented regarding elementary schools in Omaha. No evidence was presented to indicate that the educational opportunities for Gaige in Washington are superior to those in Nebraska.

While Stark testified about the availability of education in Washington for herself, there was no evidence that these schools would be an improvement over her current education.

We conclude that Stark failed to show that schools in their new community would be superior to schools in their Nebraska community. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (educational advantages factor receives little or no weight when custodial parent fails to prove that new schools are superior); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

Because Stark has not proved that any educational advantages exist in Washington, this factor weighs neither in favor of nor against the move.

f. Quality of Relationship Between Gaige and Parents

With regard to this consideration, the record demonstrates that Gaige has a good relationship with both parties. Because of the distance between Nebraska and Washington, removal will necessarily result in reducing the amount and frequency of time that Weatherholt and Gaige are able to spend together, which the district court found would negatively affect Gaige's relationship with Weatherholt. The district court made no factual findings regarding the quality of Gaige's relationship with Stark except that it found it was in Gaige's best interests to grant Stark sole physical and legal care and custody. The evidence does show that Stark is Gaige's primary caretaker.

In our de novo review, we find that because both parents have a good relationship with Gaige, this factor does not prevent or favor the move.

g. Ties to Community and Extended Family

Next, we consider the child's ties to the present community, Omaha, as well as his ties to the potential new community in Washington. The district court found that the strength of Gaige's ties to his extended family in Nebraska weighed against removal because both Stark's and Weatherholt's extended families live in Nebraska.

Stark's parents and grandparents both live in Nebraska, and Mahler's parents also live in Nebraska. Stark testified that her family's relationship with Gaige is good and that her mother and Gaige are "very close." Stark indicated that because both her family and Mahler's family lived in Nebraska, they would visit often. Weatherholt's mother and his grandparents live in Nebraska as well and have a good relationship with Gaige. There was no evidence presented regarding any family in Washington other than Mahler.

Under these facts, we agree with the district court's finding that this factor weighs against removal.

h. Likelihood of Antagonizing Hostilities

Finally, we consider the likelihood that allowing or denying the move would antagonize hostilities between Stark and Weatherholt. The district court made no findings as to whether

there would be an increase or decrease in hostilities, but it did note that Stark testified that she hoped the increased distance would alleviate the arguments and difficulties that the parties face in Omaha.

Both parties admit that there have been communication problems between them. Evidence was presented to suggest that some of the disagreements between the parties have resulted over visitation issues and Weatherholt's desire to be more involved in Gaige's life. Stark testified that it would be beneficial for her to be allowed to move because she and Weatherholt would have less direct contact, resulting in fewer arguments between them. However, the parties would still be required to communicate concerning visitation and travel issues, as well as important matters in Gaige's life, should the move be allowed.

We conclude that the record does not support a finding that granting removal would result in any change in the hostilities between the parties. This factor does not weigh either in favor of or against the move.

i. Quality of Life Conclusion

Our de novo review of the record leads us to conclude that Stark has not satisfied her burden of proving that the removal will enhance the quality of life for Gaige and herself. Other than the economic benefit of living in one household with her husband, Stark has not shown any other advantages that a move from Nebraska to Washington would provide.

(iii) Impact of Move on Contact Between Weatherholt and Gaige

The third factor to be considered is the impact removal will have on contact between the child and the noncustodial parent, when viewed in light of reasonable visitation arrangements. In the present case, it is clear that the distance between Washington and Nebraska will diminish the amount of contact available between Gaige and his father. This effect must be viewed in light of the court's ability to devise reasonable visitation arrangements. See, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). Generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008). Of course, the frequency and the total number of days of visitation and the distance traveled and expense incurred go into the calculus of determining reasonableness. *Id.* Indications of the custodial parent's willingness to comply with a modified visitation schedule also have a place in this analysis. *Id.*

The visitation between Weatherholt and Gaige prior to trial occurred every other weekend and one weekday evening per week. Stark proposed giving Weatherholt longer uninterrupted periods of time with Gaige if they were allowed to move to Washington. Stark proposed that until Gaige is "school age" that he could visit Weatherholt approximately 5 weeks out of the year or once every 3 months. She also suggested twice-a-week telephone calls between Gaige and Weatherholt, but acknowledged that they could speak every day if that is what Weatherholt wanted to do.

Stark testified that there are several flights available on multiple airlines between Omaha and Seattle, Washington, which is 40 to 45 minutes away from Fort Lewis. She estimated that

the average cost of a round-trip ticket would range from \$300 to \$400. Stark proposed that the parties split the costs of the visits equally or that Weatherholt would pay 70 percent and she would pay 30 percent.

Weatherholt testified that it was “unfathomable” to even think about Stark’s moving with Gaige. However, he suggested that if the court were to allow Stark to move with Gaige to Washington, that he be allowed to have Gaige live with him half the year until he reached school age, and then that he be allowed to have the entire summer with Gaige as well as other school breaks.

The district court found that Weatherholt has a “full paternal relationship with his son, Gaige. He sees Gaige when the parenting time is available to him and is very much a part of Gaige’s life.” The court further found that the impact of relocation on the contact between Weatherholt and Gaige

would indeed be significant. Due to the long distance between them, their ability to be with one another would be greatly reduced. Certainly the week to week contact that [Weatherholt] would have with Gaige in Nebraska would be substantially better for their relationship than blocks of time that they would have to endure over a long-distance relationship.

We recognize the difficulty that courts face in determining removal issues. In most removal cases, the frequency of the noncustodial parent’s visitation is likely to be reduced by distance. Although Stark seemed willing to work with Weatherholt on the issue of visitation, it cannot be reasonably questioned that such visitation would allow Weatherholt significantly less contact with Gaige and would make it nearly impossible for him to maintain the relationship that he currently enjoys.

We conclude on our de novo review that moving Gaige to Washington would significantly diminish Weatherholt’s ability to maintain his relationship with Gaige. As such, this factor weighs against removal.

(iv) Best Interests Conclusion

Where there are no clearly right or clearly wrong answers, it is particularly important to bear in mind that our standard of review allows us to give deference to the discretion of the trial judge, who observed the demeanor of the witnesses as he heard their testimony. To reverse would require us to find that the district court’s decision is untenable and unfairly deprives Stark of a just result. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

After our de novo review of the record, detailed above, we conclude that the district court did not abuse its discretion in denying Stark’s request to remove Gaige from Nebraska to Washington. Although Stark’s marriage provided a legitimate reason for leaving the state and living with Mahler in one household would somewhat improve the quality of life for Stark and Gaige, Stark failed to otherwise carry her burden of showing that the quality of life for her and Gaige would be significantly improved by the move to Washington. Considering the detrimental effect that the move would have on the relationship between Gaige with Weatherholt, we agree with the district court that such a move is not in Gaige’s best interests.

2. ATTORNEY FEES

Finally, Stark argues that the district court erred in not awarding her attorney fees. An attorney fee affidavit for services rendered to Stark between March 2010 and April 2011 totaling \$2,707.98 was accepted into evidence. The trial court denied Stark's request for attorney fees without comment.

An award of attorney fees depends on a variety of factors, including the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). In addition, attorney fees are normally awarded to the prevailing party. See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). Here, Stark did not prevail on her request for removal. After considering each of these factors, we conclude that the district court did not abuse its discretion in not awarding attorney fees to Stark.

VI. CONCLUSION

For the reasons discussed above, we conclude on the basis of our de novo review that the district court did not abuse its discretion in denying Stark's application to remove Gage from Nebraska to Washington or in declining to award attorney fees. We therefore affirm the judgment of the district court.

AFFIRMED.